

**TAMARACK MILL, L.L.C. d/b/a
EVERGREEN FORESTS,**

Appellant

Representing the Appellant:

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**AGBCA Nos. 2003-115-1
2003-116-1**

DECISION OF THE BOARD OF CONTRACT APPEALS

October 20, 2005

Before POLLACK, VERGILIO, and STEEL, Administrative Judges.¹

Opinion by Administrative Judge POLLACK.

These appeals arise out of Contract No. 005308, Filly Creek Timber Sale and Contract No. 005332, Rubicon Timber Sale, between Tamarack Mill, LLC, d/b/a Evergreen Forests, New Meadows, Idaho, and the U. S. Department of Agriculture, Forest Service (FS), Payette National Forest, McCall, Idaho. On October 4, 2002, Appellant filed these two separate appeals for which Appellant claims damages due to suspension. Each claim was addressed by a separate final decision. The Appellant sought \$1,150,473.95 under the first contract and \$2,243,818.25 under the second contract.

The Board has jurisdiction over these timely-filed appeals pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended.

¹ Administrative Judge Steel of the Interior Board of Contract Appeals, sits by designation.

After engaging in discovery, the Appellant, on March 27, 2003, filed a Motion for Summary Judgment. The FS filed an opposition and Appellant, thereafter, filed a reply to that opposition. On March 31, 2004, the Board issued a Ruling denying Appellant's motion. Tamarack Mills, LLC, AGBCA Nos. 2003-115-1 and 2003-116, 04-1 BCA ¶ 32,591.

Prior to issuing its Ruling on Appellant's Motion for Summary Judgment, the Board, on March 10, 2004, had issued a Ruling on cross-motions for summary judgment in the appeals of Shawn Montee, Inc., AGBCA Nos. 2003-132-1 et al., 04-1 BCA ¶ 32,564. That Ruling involved a number of similar issues to those in Tamarack. Moreover, both Tamarack and Shawn Montee were represented by the same counsel. After denial of the motion in Shawn Montee, counsel for Shawn Montee elected to seek reconsideration of the Board Ruling. That action affected this appeal, in that Appellant filed a Motion for Enlargement of Time in which to file for reconsideration in this case, pending the outcome of the Shawn Montee reconsideration. After discussing matters and scheduling with counsel for the parties, the Board granted Appellant's motion and put this appeal on hold, including discovery, pending the ruling on reconsideration in Shawn Montee.

On October 6, 2004, the Board issued a ruling denying the motion for reconsideration in Shawn Montee, AGBCA Nos. 2004-153-R through 157-R, 04-2 BCA ¶ 32,755. Appellant then asked the Board to certify for interlocutory appeal to the Court of Appeals for the Federal Circuit, the legal question of whether the contract clause C [T] 6.01 limited the FS's liability for suspension caused by its own failure to meet its pre-award environmental obligations. The Government opposed the certification. On February 16, 2005, the Board certified the question to the Federal Circuit. By letter of March 28, 2005, counsel for the FS requested that discovery continue to be held in abeyance pending action by the Federal Circuit on the interlocutory appeal. On May 2, 2005, the Federal Circuit in Shawn Montee, Inc. v. Mike Johanns, No. Misc. 788, 2005 WL 1231832 (Fed. Cir. 2005), denied permission to take the appeal, stating that "The decision whether to grant a petition for permission to appeal is within this court's jurisdiction." After citing authority, the Court noted that in the case of Shawn Montee, it concluded that the better course was for the AGBCA to develop the factual record and fully adjudicate the legal issues prior to appellate review.

Upon issuance of that decision by the Court, the Board by letter of May 4, 2005, directed Appellant and the FS to resume discovery.

Shortly thereafter, the parties advised the Board that they had agreed to commence settlement discussions. The parties again requested that the Board suspend discovery pending the outcome of discussions.

On September 30, 2005, the Board was notified that the parties had reached a settlement in the appeals. The settlement agreement stipulated that the FS would pay \$1,500,000 by or before 60 days following the entry of judgment by the Board. The Government accepts this liability and the parties request that the Board grant the appeals.

DECISION

The Board grants the appeals. The contractor is to recover \$1,500,000 from the Government as full and final payment under the contracts to resolve these disputes; no further claims may be asserted under or related to the contracts or these disputes. Because the determination is final and binding, and (by agreement of the parties) is not subject to appeal, payment may be made pursuant to CDA, 41 U.S.C. § 612.

HOWARD A. POLLACK

Administrative Judge

Concurring:

JOSEPH A. VERGILIO

Administrative Judge

CANDIDA S. STEEL

Administrative Judge

**Issued at Washington, D.C.
October 20, 2005**